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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SEAN ANTHONY DONOHUE, Defendant and Appellant.	A144656 (Contra Costa County Super. Ct. No. 51423706)

After jury trial, defendant Sean Anthony Donohue was convicted of second-degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), and sentenced to a four-year probationary term. He seeks reversal of his conviction on the grounds of insufficient evidence and instructional error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The charge against defendant arose from an incident that occurred in a grocery store and its adjoining parking lot in San Pablo. The circumstances of the offense were presented through the testimony of two store employees, Karl Manning, the night crew chief, and Juan Arroyo, who worked in the produce department, as follows.

Defendant and two other men entered the grocery store in the early morning hours of July 19, 2014. The three men, having possibly used marijuana, were loud, making a ruckus, and wandering the aisles. When the three men were at the check out register, the security guard asked defendant's companions to remove certain items they had hidden in their clothing and all three men were asked to leave the store. Defendant's two

companions dumped the items on the "conveyor belt" and all three men began to leave the store. Manning and other employees walked toward the door to make sure the three men actually left.

Defendant followed his two companions as they left the store. On his way out, defendant turned and displayed a package of sausages from under his shirt. According to Manning, defendant shouted some profanity, while "brandishing" the package – holding the package in his hands and shaking it at the employees, and saying, "Look what I have . . . ." According to Arroyo, defendant kept the sausages in the waistband of his pants when he said, "Look what I have . . . ." When Arroyo asked defendant to return to the check-out register to pay for the sausages, defendant replied, "I am not going to pay for this . . . ." Defendant did not hand the sausages to anyone and he did not drop them on the ground. Arroyo saw the package of sausage fall inside defendant's pants but never onto the floor. Defendant ran out, spitting on the door as he left. He tipped over a magazine rack that was outside the door and threw some magazines in the general direction of Manning and other employees who were pursuing defendant.

As Manning pursued defendant across the parking lot he told the other employees, in a loud voice, "Don't worry, I will get their license plate," and he pulled out his cell phone. Apparently hearing Manning's statement, defendant turned back toward Manning. Defendant said, "you not getting shit," and hit Manning in the face causing a split lip injury requiring ten stitches. The punch knocked Manning to the ground. The other employees helped Manning to his feet and Manning continued to pursue defendant and his companions.

Defendant and his two companions retreated across the parking lot toward a car, with Manning following. Manning was still intent on photographing the license plate of the car. Defendant and one of his companions began punching Manning. At some point Manning got a photograph of the license plate of the car. He then decided not to let the men get away so he punched back, striking defendant several times. Ultimately, one of defendant's companions got into the car, eventually followed by defendant and his other companion. Defendant drove off in the getaway car.

Manning called 911 on his cell phone. The tape of the 911 call was played for the jury. During the call, Manning reported the license plate number of the getaway car, and said that the men "got away with a package of sausages." The police responded to the 911 call, took Manning's statement and photographed his injuries. Based on Manning's information, the police used the license plate number of the getaway car to locate defendant, found to be the registered owner of the car. Manning identified defendant from a photographic lineup arranged by the police. The package of sausages taken by defendant was never recovered.

DISCUSSION

I. Sufficiency of Evidence to Support Second-Degree Robbery Conviction

Defendant argues there is insufficient evidence that he committed second-degree robbery because there was no evidence that he used force or fear to take or prevent the store employees from retaking the stolen sausages. According to defendant, he only used force to prevent Manning from obtaining information (photograph of license plate of getaway car) that could lead to defendant's arrest for theft. According to defendant, "[t]his is not robbery." We conclude defendant's argument is unavailing.

" 'Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; see *People v. Scott* (2009) 45 Cal.4th 743, 749 [89 Cal.Rptr.3d 213, 200 P.3d 837] . . . .) A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence. (*People v. Gomez* (2008) 43 Cal.4th 249, 256, 264 [74 Cal.Rptr.3d 123, 179 P.3d 917] [(*Gomez*)]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27 [194 Cal.Rptr. 909] [(*Estes*)].)' (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1349 [115 Cal.Rptr.3d 228].) That is, '[a] robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . .' [Citation]." (*People v. McKinnon* (2011) 52 Cal.4th 610, 686-687; see *People v.*

Williams (2013) 57 Cal.4th 776, 787 ["[b]ecause larceny is a continuing offense, a defendant who uses force or fear in an attempt to escape with property taken by larceny has committed robbery"].)

Here, the jury could reasonably find defendant elevated his theft to a robbery by his conduct as he fled from the store pursued by Manning. Defendant does not dispute that Manning's stated intent to take a photograph of the getaway car's license plate was to aid in defendant's identification and later arrest for the theft. The jury could reasonably find that defendant's act of punching Manning was to allow defendant to retain the stolen property and facilitate his escape.

We see no significance to defendant's reliance on our decision in *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*). In *Hodges*, we were faced with a situation where the defendant attempted to relinquish or abandon the stolen property before he used force to resist apprehension by a store's loss prevention officers. (*Id*. at pp. 535-536.) During its deliberations, the jury sought guidance on whether the timing of defendant's surrender of the stolen property was relevant to the element of force or fear in establishing robbery. (*Id*. at p. 543). We found that the court's response to the jury's query was misleading because it allowed the jury to conclude defendant was guilty of robbery (a) without regard to whether defendant intended to permanently deprive the owner of the stolen property at the time the force or resistance occurred, and (b) without finding that defendant used force with the intent to retain the stolen property or prevent its recovery by the lawful owner. (*Id*. at p. 543.) As part of our analysis, we proffered "the following hypothetical: A person leaves a store without paying for goods, drops the goods when confronted by a security guard, and flees; the guard gives chase and at some point during the pursuit, the person uses force to resist the pursuing guard's attempt to detain him. Under this hypothetical, the escape rule, concerning the *duration* of the offense, is not in play because no robbery was *committed*, there being no evidence that the person intended to deprive the owner of the property at the time force was used." (*Id*. at p. 543, fn. 4.)

Defendant argues that like the situation in *Hodge*s, the record here demonstrates that he did not use force or fear in taking the sausages, he did not use force or fear to retain possession of the sausages, and his intent in punching Manning was not to retain possession of the sausages but just to stop Manning from taking a photograph of the license plate of the getaway car. However, as an appellate court, we must view the record " 'in the light most favorable to the judgment [in the trial court] to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt.' " (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) As explained by the court in *Estes*, *supra*, 147 Cal.App.3d 23, a theft can be elevated to a robbery if a thief later uses force to retain possession of the stolen property and to facilitate his escape. (*Id.* at p. 28.) In analyzing an *Estes* robbery, "[d]efendant's guilt is not to be weighed at each step of the robbery as it unfolds." (*Id.* at p. 28.) In this case, the evidence and reasonable inferences to be drawn therefrom, demonstrate that once defendant took the sausages he never abandoned, dropped, or sought to relinquish the stolen property to the store employees. Instead, defendant did everything he could to retain and permanently deprive the owner of the stolen property. The jury was free to find that defendant's reason for punching Manning – to prevent his taking a photograph of the license plate of the getaway car – was "in furtherance of the robbery and can properly be used to sustain the conviction." (*Ibid*.)

II. Trial Court's Instructions

A. Relevant Facts

The trial court advised the jury on the elements of robbery using the language in CALCRIM No. 1600, in the following manner: "The defendant is charged with Second Degree Robbery, in violation of Penal Code section 211. [¶] To prove that the defendant is guilty of this crime, the People must prove beyond a reasonable doubt that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his or her immediate presence; [¶] 4. The property was taken against that person's will; [¶] 5. The

defendant used force or fear to take the property or to prevent the person from resisting; and [¶] 6. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property." The court added to its instructions (1) the concept of a *Estes* robbery by advising that jury: "A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he or she uses force or fear to retain or to carry it away in the victim's presence;" and (2) the concept of the escape rule using language in CALCRIM No. 3261, by advising the jury: "The crime of robbery continues until the perpetrator actually reaches a place of temporary safety. The perpetrator has reached a place of temporary safety if: [¶] • He has successfully escaped from the scene; [¶] • He is not or is no longer being chased; and [¶] • He has unchallenged possession of the property."

B. Analysis

Defendant argues the trial court committed prejudicial error by using language in CALCRIM No. 3261, discussing the escape rule, to instruct the jury on the concept of the duration of a robbery. We disagree.

The general rule is that " ' "in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] . . . 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos (*2008) 163 Cal.App.4th 1082, 1088.)

Contrary to defendant's argument, the court's instructions were a correct statement of law. "In robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense," a taking of property "with the intent to steal and carry it away" . . . "must be accomplished by force or fear and the property must be taken from the victim or in his presence." (*Gomez, supra*, 43 Cal.4th at pp. 254-255.) " 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.] Although the slightest movement may constitute asportation (citation), the theft continues until the perpetrator has reached a place of temporary safety with the property (citation)." (*Id.* at p. 255.) So, too, " '[t]he crime of robbery also includes the element of asportation and appropriation of another's property.' " (*Id.* at pp. 256-257.) Thus, our Supreme Court has cited with approval Court of Appeal cases "holding that 'mere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot.' " (*Id*. at p. 257, citing several cases including *Estes, supra*, 147 Cal.App.3d at pp. 27-28.)

According to defendant, the escape rule language in CALCRIM No. 3261 is only to be used "if the defendant is facing criminal liability under other statutes for engaging in conduct while committing a robbery." Defendant is mistaken. As our Supreme Court explained in *People v. Wilkins* (2013) 56 Cal.4th 333 (*Wilkins*), although the escape rule originated in felony murder cases, "[t]he escape rule also has been extended to other contexts requiring proof that an act occurred in the commission of a crime—such as inflicting great bodily injury in the course of commission of a crime [citation], kidnapping for purposes of robbery [citation], and use of a firearm in the commission of a robbery [citation]." (*Id*. at p. 341.)

Significantly, the bench notes for CALCRIM No. 1600 (elements of robbery), advise the trial court to instruct a jury on the duration of a robbery using the language in CALCRIM No. 3261 when, as in this case, there "is an issue as to whether the defendant used force or fear during the commission of the robbery." (Bench Notes to CALCRIM No. 1600 (2016 ed.) at p. 1086, citing to *Estes, supra*, 147 Cal.App.3d at p. 28.) The

bench notes for CALCRIM No. 3261, then advise the trial court to "[g]ive this instruction whenever the evidence raises an issue over the duration of the felony and another instruction given to the jury has required some act 'during the commission or attempted commission of the felony.' " (Bench Notes to CALCRIM No. 3261 (2016 ed.) at p. 901, quoting from *Wilkins, supra*, 56 Cal.4th at pp. 347-348.) This bench note demonstrates that the escape rule was relevant under the circumstances of this case. First, as in an *Estes*-type robbery case, this case raised "an issue over the duration of the felony" because there was evidence showing that defendant used force while he carried away the stolen property during his escape. Second, "another instruction," here the elements of robbery (CALCRIM No. 1600), required an act of force or fear "during the commission . . . of the felony." (CALCRIM No. 3261.)

Defendant's reliance on our decision in *Hodges, supra,* 213 Cal.App.4th 531, is again misplaced. As we have noted, in *Hodges*, we were faced with a situation where the defendant's relinquishment or abandonment of the stolen property occurred before his use of force. Consequently, under those circumstances, we held that an instruction using language similar to CALCRIM No. 3261 was "misleading" because it allowed the jury to conclude defendant was guilty of robbery without regard to (a) whether defendant intended to permanently deprive the owner of the stolen property at the time the force or resistance occurred, or (b) whether defendant used force with the intent to retain the stolen property or prevent its recovery from the lawful owner. (*Id*. at p. 543.) Here, when all the instructions are read together, it is clear that the trial court appropriately used the escape rule language to clarify when the use of force or fear occurs during the commission of a robbery. Thus, we reject defendant's claim of instructional error.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

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